IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 677

KYCOGA LAND COMPANY, a Corporation,
Petitioner,

vs.

KENTUCKY RIVER COAL CORPORATION, a Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETER T. WHEELER,
Hazard, Kentucky,
SIMEON S. WILLIS,
Ashland, Kentucky,
Attorneys for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

SUBJECT INDEX.

VIII.

Alphabetical Table of Texts and Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. .....

KYCOGA LAND COMPANY, a Corporation,
Petitioner,

vs.

KENTUCKY RIVER COAL CORPORATION, a Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Kentucky River Coal Corporation, in opposition to the petition herein filed by the Kycoga Land Company, for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, respectfully represents:

I.

This was an action to recover a tract of 100 acres of coal land in Knott County, Kentucky, and to recover damages for mining by respondent's lessee of about seven and one-half acres of coal from the tract. The respondent owned the land surrounding the tract in question and believed it had a good title to the particular parcel. The question of title was tried first and resulted in favor of petitioner. The question of damages was referred to a Special Master, whose report was to have no presumptive effect, reserving for determination by the Court as if no findings had been made all questions embraced in the reference (Record pp. 71-72). The Special Master made a report, to which both parties excepted. The District Court found the trespass to be an innocent one and awarded compensatory damages in accordance with the rule in Kentucky. The Circuit Court of Appeals affirmed the judgment.

II.

The "Explanation for the guidance of the Court" (Petition pp. 1-4) is in the nature of argument, omitting the opposing documents and evidence and ascribing to the maps and documents listed on pages 2, 3 and 4, and numbered (a), (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k), probative effects not justified by them. None of the maps or documents so listed show or tend to show that respondent had knowledge of plaintiff's ownership of the land in controversy or knowingly or deliberately or at all procured, permitted or caused its lessee to mine any coal therefrom. On the contrary, Mr. W. S. Dudley, who was president of respondent, believed that the land claimed by petitioner lay on the Trace Fork of Irishman Creek (Record, Vol. 11, page 69), remote from the mining operations of the lessee. The letter of Mr. Buford C. Tynes, dated February 3, 1923, photostat copy of which is attached to

the back of the Petition as Exhibit A, referred to the William Kelly tract, which is the tract in controversy, as "situated in the very head of a right-hand fork of Lotts Creek," and did not constitute notice of its actual location, or such a reference as was calculated to correct the impression of Mr. Dudley as to its being on the Trace Fork of Irishman Creek. The land in fact was located on "Road Fork," or "Deadening Fork," as it was sometimes called, which was a branch of the right fork, known as Kelly Fork of Lotts Creek. The "very head" of that fork was more than a mile from the place where the coal was mined. This mistake of Dudley as to where the land was located must be borne in mind in considering his words in respect to the land claimed by petitioner, and all his acts in the matter.

The proof for respondent showed that the mining of the coal was the result of innocent mistakes not uncommon or unlikely in the circumstances. The land was located in a wild section of country at least two miles from the Knott tipple, at a time when it was believed that all land claimed by petitioner was a mile farther away from the actual operations. Both the trial court and the Circuit Court of Appeals found from the evidence that the trespass was an innocent or inadvertent one, which was in accordance with the great weight of the evidence.

III.

PROCEEDINGS IN THE DISTRICT COURT.

The recital of the proceedings had in the District Court (Petition pages 4-14) is so tinctured with partiality that certain additional facts must be supplied in order that a correct picture may be presented to the Court.

(1) The reference to the pleadings omits mention of the amended answers filed from time to time in which all the

defenses were presented. The original answer was filed January 23, 1931 (Record, p. 23). An answer to the third amended bill was filed on June 12, 1933 (Record, p. 97), and the petitioner's reply was traversed of record (pages 139-140). Then an amended answer was filed on January 8, 1934 (Record, p. 153). These pleadings relied on denials, champerty, waiver, ratification, confirmation, adoption, release and estoppel, and on good faith and innocence in the matter of the trespass by the lessee of respondent. No question of the sufficiency of the pleadings was raised in the lower courts.

(2) Judge Cochran decided, after much labor and considerable difficulty (Record, Opinion, Vol. 1, pp. 49-69), that the petitioner had the better title, and he ordered a reference to a Special Master "to ascertain what damages occurred to plaintiff's property by reason of the trespasses set out and alleged in its petition subsequent to May 1, 1927," and also "to find what damage occurred prior to May 1, 1927," reserving for further consideration the right of recovery in respect to such alleged damage. He provided by his order to the Special Master that "the findings which he may make shall not be final or given any presumptive effect, but the question as to all such matters shall be open for determination by the Court as if no findings had been made" (Record, pages 71-72).

The Special Master reported on August 11, 1933 (Record, pp. 118-122), filing the evidence with his report. Four days before the printed report of the Special Master was filed, the petitioner presented a motion to dismiss the action as to respondent's lessee, the Knott Coal Corporation (Record, p. 113), which motion was granted on August 23, 1933 (Record, pp. 123-124). No doubt terms had been reached with it. The Special Master's report was not based on a finding of facts from a consideration of con-

flicting testimony, but consisted of some dogmatic deductions from circumstances wholly insufficient to justify the conclusions he stated. The first circumstance relied upon by the Special Master was that three tracts of land, known as the Watts, Franklin and Litz tracts, had been included in the lease to the Knott Coal Corporation on a mere expectancy that they could be acquired and would be acquired. This was not true, as matter of fact (Record, Vol. III, p. 61; Testimony of G. Turner Howard, Vol. II, page 58). The tracts referred to were adjacent lands, not embraced in the lease at that time, but desirable to be acquired later. From this circumstance, the Special Master inferred or imagined that the respondent had knowingly embraced the land claimed by petitioner in the lease in the hope that it could be acquired. The only other circumstance mentioned by the Special Master was a portion of a letter written by Mr. Dudley, after the controversy arose, in which he stated that while the tract in controversy was included in the outside boundary of the lease, the company never claimed title to this tract, but expected or hoped to get it, in which event it would be added to the lease. As a matter of fact, Mr. Dudley knew the Kycoga Land Company claimed some land in that section, but he believed it was located on another creek, known as Trace Fork of Irishman's Creek (Record, Vol. II, p. 69).

The Master's report was contrary to the facts and recommended a rule of damage in disregard of the law of Kentucky in trespass cases.

Both parties recognized this and filed exceptions. The opinion of the Circuit Court of Appeals accurately notes:

> "Both parties agree that the Master's recommendation in this respect is untenable. The Court did not adopt it or consider it of sufficient merit to warrant discussion" (Opinion, Record, Vol. III, p. 127).

The District Judge wrote a careful opinion, finding the trespass to be an innocent or inadvertent one, and applied the rule of reasonable royalty, which is the settled law of Kentucky in such cases (Opinion, Record, Vol. I, p. 174).

The Circuit Court of Appeals affirmed the judgment (110 Fed. [2d] 894; Record, Vol. III, p. 126). The opinion exhaustively deals with every point suggested by the petitioner in that court, and sustained the finding of the trial court that the trespass was inadvertent and innocent.

IV.

The petition sets out what is called "the salient facts (mostly documentary) upon which the petitioner relied to show the trespass was willfully, knowingly and intentionally committed" (Petition, pp. 14-26). But they fail to cite the record for many of the statements made, and we are unable to find in the record any support for the statement in the opening paragraphs regarding a particular seam of coal, and the negotiations preceding the so-called letter lease of August 2, 1919.

It is not true that the Kentucky River Coal Corporation owned less than two-thirds of the acreage it leased to the Knott Coal Corporation. In fact, it owned, or believed in good faith that it owned, all of the land it leased to Knott. The letter containing a description of the outside boundaries of the lease referred to some adjacent tracts which it did not own, but which it would endeavor to acquire. These outside lands were known as the Watts, Franklin and Litz tracts (Record, Vol. III, p. 61; Testimony G. Turner Howard, Vol. II, p. 58). It will be noted from the description of the tract of land in the letter lease that it stopped at a point "at the Trace Fork of Irishman Creek side opposite the head of Kelly Fork of Lotts Creek."

Mr. Dudley at all times was under the impression that all

the land within that boundary belonged to the Kentucky River Coal Corporation. It was so shown on his map, and while he was aware of the fact that certain lands were owned by Bright or Webb & Hoppin (now Kycoga Land Company's land), he thought it was located on the Trace Fork of Irishman's Creek, and completely outside the boundary of the Knott lease. The lease letter to L. N. and Hugh Buford was dated August 2, 1919, and it was to be followed by a formal lease, when the boundary could be surveyed and accurately described, and the full terms of the lease determined. This was subsequently done; formal lease was given on March 15, 1921, and recorded on July 20, 1922. The Kycoga Land Company was not then in existence, and did not come into the picture until May 1, 1927, when Webb and Hoppin, who had acquired the Bright tracts, conveyed to the Kycoga Land Company. This was the reason for Judge Cochran separating the damages into two periods. One was the period prior to the formation of the Kycoga Land Company, and the other was the time subsequently thereto. This was the explanation of why Webb and Hoppin became parties to the litigation. This fact illustrates the absurdity of the claim by petitioner (Petition, p. 18) that on February 23, 1923, Mr. Dudley put initial letters on certain tracts of land. An inspection of the map will show that the penciled letter appearing on several tracts is "K." The contention that this referred to "Kycoga" overlooks the fact that Kycoga did not come into the title until May 1, 1927, several years after this supposed conference. The lands then were claimed by Webb and Hoppin. It is upon such flimsy testimony that petitioner sought to bring notice of its claims to Mr. Dudley, who was dead when that testimony was given. Mr. Tynes referred to him as the "late Mr. Dudley" (Record, Vol. III, p. 443).

The question was raised whether the Kycoga Land Com-

pany could recover in any event for trespass committed on the land prior to the time it acquired title from Webb and Hoppin.

The negotiation of Mr. Dudley for the purchase of land from Mr. Tynes, who represented the Bright interests, was not confined to the single tract now in controversy. It was among the least of them. The negotiations covered numerous tracts and contemplated the purchase of inside tracts, or the exchange for other tracts so as to give each party compact and solidified boundaries. It concerned 1,800 to 2,000 acres, made up of small tracts (Record, Vol. II, page 69). In the letter of Mr. Tynes, dated February 3, 1923, he points out several tracts that are within the general boundary of the developed properties of the respondent. It so happened that the tract in controversy was included in the negotiations, but nothing occurred at any time anywhere in the record to bring to Mr. Dudley's attention the error under which he was laboring in regard to the location of the particular tract now in controversy. It must be remembered that the mining by Knott under the lease proceeded from 1921 to 1929 before any trouble arose. The discovery was made when about seven and one-half acres of the 100 acres in controversy had been mined by the Knott Coal Corporation. Immediately upon discovery of the fact that it was the Kelly tract, which both parties claimed to own, the mining was stopped, as pointed out by the District Judge in his opinion (Vol. I, p. 178), where it was said:

> "This immediate discontinuance of the act of trespass upon discovery of a mere doubt in regard to the title is not consistent with the theory of willful and wanton trespass advanced by the plaintiff. Such conduct is not the act of a man desiring or intending to steal or commit a fraud. It is potent evidence of mistake and inadvertance."

The attempt to state the salient facts omits entirely the important facts developed in defense of the claim for damages. The petitioner at all times refused to notice or recognize the fact that Mr. Dudley labored under a misapprehension as to the location of the land. The Kentucky River Coal Corporation was not in existence when many of the important facts occurred. As Judge Cochran pointed out in his opinion, the Kentucky River Coal Corporation had no knowledge of any of the negotiations between the Slemp interests and the Bright interests, but it was legally chargeable with the results of the settlement made, because it derived title later through some of those companies. But constructive knowledge is not sufficient to charge one with willful trespass. The Kentucky River Coal Corporation did not trespass on the land at all. Its lessee did so innocently, and the land included in the lease to the Knott Coal Corporation was property which it believed in good faith that it owned, even though its claim of ownership was finally adjudicated against it. The very fact that the question was difficult of decision, and that it was extremely doubtful as to which had the better title to the property is sufficient to excuse any trespass from being characterized as willful. The so-called salient facts are so distorted from their setting and true meaning, and so separated from the other facts in the record, that they are lacking in probative value. Notwithstanding the position insisted upon by the petitioner, the concurrent findings of the District Court and the Circuit Court of Appeals sustained the defenses, and there is substantial evidence supporting the decisions. The vital question involved turned on a single fact, whether the trespass of the Knott Coal Corporation was willful or innocent. Even the Special Master found that the Knott Coal Corporation was innocent, and it was the sole trespasser. It was mere dogmatic assertion on the part of the Special Master that a mere lessor, who did not trespass at all, was yet guilty

of willful trespass, because in 1919 the land was included in the lease without any knowledge as to its location, as finally established. Both courts considered the whole case exhaustively, and decided it in accordance with the law of Kentucky.

V.

BASIS OF THE COURT'S JURISDICTION.

This is a case where jurisdiction depended upon diversity of citizenship. The jurisdiction of this Court is invoked under provisions of Section 240 of the Judicial Code, as amended [United States Code, Annotated, Title 28, Section 347 (a)]. But there is no meritorious ground for a review of this case. There is no conflict with the decision of any other circuit. Both the District Court and Circuit Court of Appeals followed the Kentucky law, as laid down by the Court of Appeals of Kentucky in numerous cases. They correctly interpreted and applied the evidence. They did not deny to the petitioner full compensation for its actual loss, and did not invoke or apply any equitable estoppel that was not alleged or proved, in mitigation of damages.

The statute of Kentucky referred to [Section 1244 (a)-1] does not apply to a lessor or landlord whose tenant trespasses, but only to the person who shall willfully or knowingly mine or remove coal from the lands of another. It does not apply at all to an innocent trespass. The references of the District Judge and of the Circuit Court of Appeals to the report of the Special Master were accurate and accorded with the precedents. Such ruling affords no basis for the claim that there is any conflict between the decision in this case and the decision of any other Circuit Court of Appeals in regard to the reports of Masters. There was no departure in any respect from the established rules of law.

The ultimate question involved was a question of fact. Both the lower courts, in accordance with abundant evidence, found this fact in favor of respondent. The concurrent findings of two courts, supported by substantial evidence, will be accepted as unassailable in this court.

Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 67 L. Ed. 140, 43 S. Ct. 60;
Alabama Power Co. v. Ickes, 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300.

VI.

RESPONSE TO THE BRIEF IN SUPPORT OF THE PETITION.

Point 1.

It is said that in Kentucky a trespass is presumed to have been willful until proven otherwise. The District Court and the Circuit Court of Appeals both accepted this approach to the question and applied the law of Kentucky.

Judge Ford, of the District Court (Vol. I, page 176), stated:

> "Where, as in this case, the fact of the trespass has been established, the duty rests upon the trespasser to show that the act was innocently committed, and, in the absence of such a showing, it will be presumed to have been willful."

The Circuit Court of Appeals said (Vol. III, p. 130):

> "It is true that under the rule in Kentucky, a trespass that is not explained is presumed to be willful, and the duty to show inadvertence, bona fide relief of right is upon the trespasser."

The cases cited by petitioner under point 1 were considered by the Circuit Court of Appeals, as well as by the

District Court, and applied as fully and sympathetically as any court could apply them in the face of the facts.

Point 2.

The measure of damages under the Kentucky decisions for willful conversion of the coal of another is the market value of the coal after conversion; and for an innocent trespass it is the value of the coal in place, which is conclusively established by the rule of reasonable royalty prevailing in that locality. This is the rule of the decisions cited by petitioner and that was applied by the District Court and by the Circuit Court of Appeals.

The cases under petitioner's point 2 were cited and considered by both courts below. If anything can be considered settled in Kentucky, it is the measure of damages for trespass, and the Circuit Court of Appeals had no difficulty whatsoever in ascertaining the law of Kentucky on this question, or in applying it to the facts of this case. The District Judge was equally alert and accurate.

Point 3.

It is asserted by petitioner that the District Court and the Circuit Court of Appeals disregarded the law in Kentucky, in regard to damages for an innocent trespass. The petitioner seeks to misconstrue the opinions as based on an estoppel which was not pleaded or proven.

The assumption is wholly erroneous. The opinion was not so predicated, and the pleadings were ample. The amended answer fully covered such defenses (Record, Vol. I, p. 153). It appeared from the pleadings and proof that the Kycoga Land Company tract was so located that it was impossible to mine it without going through the Kentucky River Coal Corporation's property. It could be mind only by using the outlets of the Knott Coal

Corporation, lessee of the respondent. Taking advantage of the situation, the petitioner negotiated a lease with the Knott Coal Corporation under which its coal has been, or will be, mined at a good price. (See Lease, Original paper No. 32, Howard Exhibit No. 9, testimony of G. Turner Howard, Vol. II, page 59.) The Kycoga lease adopted the provisions of the lease of Knott with respondent, and this was invoked as an adoption of its terms, which precluded any recovery beyond a restitution by the respondent of the royalty it had received. However, the judgment of the District Court and of Circuit Court of Appeals could be sustained equally upon this ground. When parties, with full knowledge of the facts concerning it, adopt or ratify a contract they thereby make themselves parties to it. 13 C. J., p. 714, Sec. 824; Drakeley v. Gregg, 8 Wall. 242, 19 L. Ed. 409; Baker v. Cummings, 181 U. S. 117, 45 L. Ed. 176.

There is no basis in fact for the argument advanced under petitioner's point 3. The defenses were duly alleged and proven, and this is the first time any criticism has been made in regard to the sufficiency or adequacy of the pleadings. However, since the Court in fact did not base its decision on the question of estoppel, but allowed the petitioner the full damage it had suffered, the point is academic. The Knott Coal Corporation and its lessor, the respondent, were innocent trespassers, and both courts so held.

Point 4.

It is argued that the Court erred in failing properly to apply the principle of corporate knowledge. The argument undertakes to make a trespasser liable for willful trespass if it turns out that he was in error, no matter how innocent he was in fact. There is no such rule of law. In

order to make a trespass willful, there must be actual knowledge, and constructive knowledge is not sufficient.

Guffey v. Smith, 237 U. S. 101, 58 L. Ed. 850;
Pine River Logging Co. v. U. S., 186 U. S. 279, 46 L. Ed. 1164;
Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 36 L. Ed. 761-762;
U. S. v. St. Anthony Ry. Co., 192 U. S. 524, 48 L. Ed. 548;
U. S. v. Homestake Mining Co., 117 Fed. 481.

No case has been cited by the petitioner to sustain its novel argument. Where a trespass has been committed in legal bad faith, but in moral good faith, because of a mistaken opinion as to legal rights, the trespasser is compelled to make restitution, but is not liable for punitive damages.

Mason v. U. S., 260 U. S. 545, 67 L. Ed. 386;
Gulf Ref. Co. v. U. S., 269 U. S. 125, 70 L. Ed. 195.

The very fact that the question of who had the better title was difficult of decision, and entailed labor on the Court, has been held by the Court of Appeals of Kentucky as sufficient evidence of innocence. The contest over the title in this case was real, and an extended investigation was necessary to determine it in favor of the petitioner. See long opinion of Judge Cochran (Record, Vol. I, pp. 49-69). The Court of Appeals of Kentucky, in Blackberry Ky. & W. Va. Coal & Coke Co. v. Kentland Coal & Coke Co., 225 Ky. 346, 8 S. W. (2d) 425, where there was a confusion of titles, said:

> "The difficulty encountered by this court in arriving at a conclusion as to which of the two claimants should be awarded the decision affords ample evidence that the Hatfields and those claiming under them may well have indulged in good faith belief that they were the owners of the 80 acres of land. Under the facts appearing in the record, this court concludes that the

chancellor correctly adjudged the trespass complained of to have been an innocent rather than a willful trespass." Quoted in Kentucky Harlan Coal Co. v. Harlan Gas Coal Co., 245 Ky. 256, 53 S. W. (2d) 538.

In Middle Creek Coal Co. v. Harris, 225 Ky. 119, 265 S. W. 465, it was said:

> "Construing the deed with reference to all its parts, and considering it in the light of these circumstances, we are inclined to hold that the reservation excluded the lot from the conveyance; however, in view of the doubtful language of the deed and of the fact that it is susceptible of the construction placed upon it by the Coal Company and of the confusion existing as to the location of the lines, we do not think the company was guilty of a willful trespass in mining the coal in question."

A willful trespasser is one who knows he is wrong, while an innocent trespasser is one who believes he is right or whose mistake was inadvertent or lacking in wrongful intent.

In Swiss Corp. v. Hupp, 253 Ky. 552, 69 S. W. (2d) 1037, the Court said:

> "The prime problem is to determine the quality of the appellees' acts in entering upon the property and extracting the oil. That they were trespassers is no longer in doubt. Their classification as willful or as innocent trespassers, as commonly called, is the hinge upon which the case hangs and upon which the decision as to the extent of recovery must turn. In the approach to the consideration of the evidence, we may suggest the abstract distinction between a willful and an innocent trespasser met with in the opinions dealing with the character of cases, namely, the one who knows he is wrong and the other believes he is right. The degree of culpability as between the two determines the extent of liability. The former

class of wrongdoers finds the way of the transgressor hard under the law. They are held to a strict accountability for their malappropriation of another's property. Complete restitution without credit for expenses incurred or deduction of costs of production is required. But those who invade the property of another inadvertently or under a bona fide belief or claim of right and extract minerals are allowed credit for proper expenditures in obtaining or producing them. While not allowed any profit, they are not be penalized. See Bozeman Mortuary Association v. Fairchild, 253 Ky. 74, 68 S. W. (2d) 756."

Point 5.

It is insisted that the findings of the Special Master should have been adopted, notwithstanding the circumstances surrounding that document. It will be recalled that the order of reference to the Special Master reserved the right of final decision to the Judge, as though no Master's report should be made, and no presumptive effect was to be given to it. Moreover, both parties recognized the Master's report as indefensible and filed exceptions to it. The cases cited in the petition are not applicable to such a situation. The Circuit Court of Appeals dealt with this question as follows:

"As already noted, the master considered the trespass willful. The Court disagreed. We are urged to accept the conclusions of the Master notwithstanding their rejection, on the ground that the master had superior opportunities for ascertaining the true facts and the presumption in favor of their correctness. The order of reference, however, reserved full power of review and specifically denied any presumption to be attached to the master's findings. In such situation they were not to any extent binding upon the independent judgment of the court, nor do they bind us. Atherton v. Anderson, 99 Fed. (2d) 883, 890. This

is not to say that inferences may not be indulged in favor of the Master's findings in the usual case where there is conflict of direct evidence, and the master has seen and heard the witnesses and the court has not. Compare Atherton v. Anderson, 86 Fed. (2d) 518, 522. But the master's findings are here based wholly upon inference, the reasonableness of which may be as fairly determined by the court as by him, and in this situation any presumption in favor of his conclusions can be of but slight importance. This is particularly true when analysis of his reasoning discloses that he drew no distinction between mere negligence and willful or wanton disregard of others' rights. That such distinction is recognized in law, we have had occasion to note in respect to tortious conduct generally. Turner v. Buchannan, 94 Fed. (2d) 723."

Point 6.

The basis of petitioner's claim was that by the inclusion of this small tract in the large lease to Knott an intention to rob the petitioner of the land was manifested. The Court addressed itself to petitioner's argument. The doctrine of liability of a mere lessor is very much controverted, but in this case the lessor was held liable for the tenant's trespass. But we find no case where a landlord has been held liable except as an innocent trespasser. The liability rests upon the legal theory that, by leasing, the landlord authorizes the trespass to be committed, and is therefore under a joint liability with the lessee. The full effect of this doctrine was given by the lower court. There can be no willful trespass from the mere fact of leasing, where lessor in good faith believes itself to be the owner of the land.

Point 7.

It is argued that the Circuit Court of Appeals misconstrued the Kentucky statutes, Section 1244 (a)-1. This

statute is limited to the actual trespasser, and does not apply at all unless the trespass was willful or intentional. Obviously the statute could not be applied to the landlord. Its terms are directed solely at the trespasser who enters on the lands of another knowingly and willfully. The statute had no application to this case, and no authority for petitioner's position is cited.

Point 8.

The lower courts, after exhaustive and complete consideration, disposed of the petitioner's claims. They found in accordance with the evidence that the trespass was an innocent one, and that full compensation was afforded the petitioner by the judgment of the District Court, awarding the royalty or value of the coal in place. The whole argument is on the erroneous assumption that the petitioner is right on the question of fact as to the character of the trespass. But the concurrent findings of the two courts against petitioner on the issue of fact takes away the whole foundation of his argument. All of petitioner's rights have been fully and adequately protected. No provision of the Constitution has been infringed. The law prevailing in Kentucky was applied to the facts of the petitioner's case, and full compensation was awarded. That was all it was entitled to receive in any court of justice.

Respectfully submitted,

PETER T. WHEELER,
Hazard, Kentucky,
SIMEON S. WILLIS,
Ashland, Kentucky,
Attorneys for Respondent,
Kentucky River Coal Corporation.

Ashland, Kentucky,
January 18, 1941.